No. 15,962

United States Court of Appeals

For the Ninth Circuit

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, deceased,
Appellant,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, and NICK KABAK, a partnership doing business as North Star Mining Company,
Appellees.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This case arose as the result of a claim in the amount of $106,791.29 filed by appellees against the Estate of Mike Stepovich for damages and lost profits due to appellees' alleged eviction from a mining lease (Pltfs' Ex. J). Appellees' claim was denied by Vuka Radovich Stepovich, Mike Stepovich's widow and the executrix of his estate (Pltfs' Exs. J and N), and appellees thereupon filed suit against her in the District Court for the Territory of Alaska, Fourth Division, as permitted by Section 4417, Compiled Laws of Alaska (1933) (now Section 61-13-4, Alaska Compiled Laws Annotated (1949)) (R. 3). Follow-

ing trial before a jury, the District Court directed a verdict for appellant. This result was reversed by this Honorable Court due to errors committed by the District Court in ruling on the applicable statute of limitations and in excluding certain items of evidence (184 F. 2d 705). Following a second trial, a jury awarded appellees a verdict of $26,802.12, and the District Court, denying appellant's motion for a directed verdict or new trial, entered judgment on March 7, 1958, in that amount, plus an award of $900.00 for appellees' attorney's fees, and $93.04 for costs (R. 33). Appellant filed a notice of appeal with the District Court on March 20, 1958 (R. 35). This Honorable Court has jurisdiction to review the judgment of the District Court by virtue of Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE.

The principal questions for decision in this case are:

1. Did appellees introduce sufficient evidence independent of their own testimony (as required by the Alaska "dead man's" statute) to permit a jury to find that they had discovered a rich gold deposit and that Mike Stepovich wrongfully evicted them from a lease for the purpose of seizing this deposit for himself?

2. Did appellees introduce sufficient evidence of damages to support the verdict returned by the jury?

On February 13, 1942, Mike Stepovich granted a lease to Nick Kupoff, James Zukoev, and Paul Drazenovich, a partnership doing business as North Star Mining Company, to prospect for gold on certain land owned by

Stepovich near Fairbanks, Alaska (Pltfs' Ex. A, R. 9, 41-43). The lease provided for the payment of a 33⅓% royalty to the lessor from all gold recovered from the premises. (Pltfs' Ex. A, Par. 5, R. 11). A vertical 8x8 foot shaft had previously been sunk on the leased premises approximately 93 feet to bed rock in connection with prior mining operations thereon, in order to reach the level on which gold might be found (R. 45-46), and the lessees were to use this shaft (Pltfs' Ex. A—description of premises, R. 9). The lease also entitled the lessees to the use free of charge of the buildings and machinery located on the premises for use in operating the mine, including a hoist bucket and mine car, hoist, boiler plant, cables, tool sheds and cookhouse (Pltfs' Ex. A, par. 1; R. 10, 44-45, 48). Lessees were obligated under the lease to supply Stepovich with an accurate record of the results of all pannings (Pltfs' Ex. A, par. 7, R. 11), and Stepovich was entitled to enter upon the leased premises at any time and to pan the ground to ascertain its value, and to determine whether operations were being conducted in accordance with the lease (Pltfs' Ex. A, par. 9, R. 12).

On February 22, 1942, the lessees entered on the lease to commence operations (R. 43). They found the vertical shaft to be almost filled with water, ice, and debris, which they proceeded to remove (R. 46, 162). This operation required approximately one month's time (R. 46, 163). At the bottom of the shaft they found three horizontal shafts, or "drifts", in which explorations and mining operations had been previously conducted (R. 47). These drifts also contained some ice and debris, but their condition was "all right" (R. 164, 168), and the lessees

proceeded to clean up the longest one, which was 60-80 feet long (R. 47-48). They then commenced thawing, digging and removing dirt and gravel in search for gold-bearing dirt, and continued this process for approximately 3½ months (R. 168). During this period the lessees removed the dirt which they had excavated, dumped it on the surface in a pile, near and on top of the sluice boxes (which were used to separate out the gold), and subsequently processed it in order to separate out the gold (R. 48, 50, 127-8, 131-2, 174-5). The processing procedure involved washing or "sluicing" the dirt through the sluice boxes to allow the heavier gold to drop from the dirt and then removing or "cleaning up" the gold from the sluice boxes (R. 67, 133-4). The lessees conducted three so-called "clean-ups" during this period, yielding the sums of $1130, $1100, and $1296 in gold, which sums were deposited in lessees' bank account on June 2nd and 16th and August 8, 1942 (Pltfs' Ex. S, R. 51, 67, 98-9). During this period, the lessees employed from one to five employees to work on the leased premises (Pltfs' Exs. D, E-1, & E-2).

On July 7, 1942 and July 9, 1942, Nick Kobak and Mike Kitoff, respectively, were taken into the partnership (Pltfs' Exs. B, C, R. 52).

One of the lessees, Nick Kupoff, testified that some time during the latter part of July or early part of August the lessees encountered gold-bearing gravel which showed better possibilities than anything they had encountered to date, and which panning showed contained a gold content averaging 50 cents to $1 a pan (R. 78-9). Based on 7 pans per cubic foot or 189 pans per cubic yard (R. 80),

this would have amounted to from $3.50 to $7.00 per cubic foot, or $94.50 to $189.00 per cubic yard. Another of the lessees, James Zukoev, testified that the lessees encountered the so-called "pay streak" during the last part of June but after having his memory refreshed during a recess, testified that the discovery was made about July 20th (R. 173-4, 178-9). He was equally uncertain about the gold content of the gravel panned as he initially was about the date of discovery, indicating it sometimes panned out at $1 a pan, sometimes less and sometimes more, and that it sometimes averaged a dollar a pan, and sometimes less than a dollar (R. 169, 173), and at one point guessed that it maybe even averaged $1.60 or $1.80 a pan (R. 173), but even lessees' own counsel did not give credence to this latter guess (R. 226, 274, 324, 382). Both of these witnesses had previously been employed as unskilled laborers, and neither had prior experience in actually panning for and evaluating gold-bearing gravel in placer mining operations (R. 125-7, 157-9). Plaintiffs offered no evidence as to the weight of the gold panned nor any other evidence of the value of their supposed find.

Earl H. Beistline, Dean of the School of Mines at the University of Alaska, called as a defense witness, testified that on the basis of Kupoff's and Zukoev's most conservative estimate of their find (i.e. 50 cents a pan, or $94.50 a cubic yard), it would have been a "very profitable operation," containing "very fine dirt," but that he was unaware of any appreciable quantities of gold-bearing gravel of that quality in the Fairbanks area at the time of trial (R. 283-4). Even plaintiffs' counsel ad-

mitted that 50 cents a pan was considered to be "exceptionally rich ground" (R. 232). Dean Beistline further pointed out that even if the plaintiffs *had* found such a placer deposit, there was no way to determine its potential yield (short of mining out the entire area) unless intensive test drilling operations were conducted (R. 268-272). None were conducted by plaintiffs or anyone competent to testify at the trial.

Although plaintiffs' own testimony suggests that they had after arduous months of labor discovered a rich pay streak (indeed, according to Dean Beistline, richer than any existing deposit in the Fairbanks area), their subsequent conduct clearly indicates that no such discovery had in fact been made. The short Alaskan summer was fast running its course, and plaintiffs, faced with the prospect that winter snows and ice would again fill up the mine shaft, should have been prompted to increase the tempo of their mining operations to remove their supposedly rich find. Indeed, their counsel argued to the jury that they were concentrating on getting as much money out of the supposedly rich gravel as early as they possibly could (R. 399-400). However, *the facts* clearly show that from the week ending June 20th on, they consistently employed only two miners (and at times only one), although previously they had at times employed as many as five miners a day (Pltfs' Exs. D, E-1, & E-2). On August 6, 1942, Paul Drazenovich, one of the original partners, quit the venture and transferred his interest to the remaining partners in return for their agreement to assume his portion of the partnership liabilities (Pltfs' Exs. I & M).

Plaintiffs never conducted another clean-up, and became delinquent in the payment of their accounts, failing to pay Mike Stepovich his share of the proceeds from the August 2nd clean-up, plus part of the proceeds of earlier clean-ups, plus payment of the first installment of rental for a small tractor used by appellees under the lease. This installment was for use from the date of inception of the lease, and was to have been paid in July, 1942 (Pltfs' Ex. A, par. 4, R. 10). As a result, on August 8th Stepovich served a demand on the lessees for such payment, together with certain other bills then due and owing, including one bill owed by plaintiffs to a merchant which Stepovich had paid on their account (Pltfs' Ex. H). This demand was satisfied on that same date (R. 74), but this left plaintiffs with a bank balance of only $233.72, which by August 10th was further reduced to $29.12 by the payment of additional bills (Pltfs' Ex. G). Their account continued in this status until August 28th (after they had left the premises), when $61.88 was deposited, and the account was then promptly closed by paying the bank a service charge and paying their accountant the balance in the account (Pltfs' Ex. G).

Plaintiffs' counsel indicated that it was necessary to run clean-ups in order to obtain money to pay their men (R. 356, 363). Under these circumstances, one would have expected plaintiffs to run additional clean-ups in August to secure funds, particularly in view of the fact that they had removed a quantity of gravel from their allegedly rich "pay streak" and dumped it on the ground by the sluice boxes (R. 80-1, R. 137-40). Yet no clean-ups

were made (R. 81, 174). The reason they did not do so is clear—the gravel removed from the so-called "pay streak" had a very low gold content. This was established by two mining engineers employed by the defendant to make independent tests of the gravel dump by the sluice boxes (R. 293, 300-301, 317-18, 319-20). Their testimony disclosed that the entire dump contained less than $800 in gold (R. 301, 320).

Mike Stepovich apparently feared that plaintiffs, in failing financial circumstances, were taking the gold from the sluice boxes prior to clean-up, without accounting to him (R. 243-5). Under the terms of the lease they were to clean up only in his presence or in the presence of his agent (Pltfs' Ex. A, par. 8, R. 11). On August 21, 1942, he filed suit against the plaintiffs for certain amounts claimed to be due and attached their supplies and the contents of the sluice boxes (Pltfs' Exs. K, L, Q, R-1, 2, 3, 4 & T). Four of the five claims sued on represented amounts admittedly owing by the lessees on account to local merchants, which accounts had been assigned to Stepovich (Pltfs' Ex. T, R. 120-1, 184-5). The fifth claim was for the use of a large RD-7 caterpillar tractor with bulldozer owned by Stepovich. (Lessees also had the use of a smaller caterpillar tractor under the lease (Pltfs' Ex. A, par. 4, R. 10)). Although Nick Kupoff denied that the lessees ever used the larger RD-7 tractor or had any dealing with it (R. 119), James Zukoev admitted that they had an agreement with Stepovich whereby they were permitted to use this tractor to plow out the road to the mine on condition that they also plow out the road to Stepovich's house so that he could come

down to his house (R. 161-2). Zukoev in effect admitted that the lessees breached this agreement by cleaning the road off only to the mine, and not cleaning the road off to Stepovich's house until a later date (R. 161-2). It is reasonable to assume that Stepovich accordingly treated the agreement as rescinded, and sued for the reasonable value for use of the tractor.

As a result of the suit by Stepovich, plaintiffs left the premises, and never returned except to pick up their personal belongings (R. 148, 183, 185). On September 26, 1942, Mike Stepovich leased the premises to United States Smelting, Refining and Mining Company for a period of fifty years (R. 109). In spite of the seeming richness of the underlying deposit (if plaintiffs' testimony is worthy of belief), no mining operations have ever been conducted under that lease and the premises were at the date of trial in the same condition as when originally leased to that company in 1942 (R. 110).

During the early part of October, 1942, Mike Stepovich and his family left Alaska and settled in the Continental United States (R. 243, 245-6). On November 24, 1942, Mike Stepovich's suit against plaintiffs was dismissed pursuant to a motion for voluntary nonsuit made after the court refused to grant his attorney a continuance (R. 85; Pltfs' Ex. O).

Plaintiffs made no attempt to regain possession of the leased premises so that they could once again mine their supposedly rich "pay streak" nor did they counterclaim in Stepovich's suit against them or otherwise seek legal relief. Instead, they waited until after Mike Stepovich's death and then filed a claim against his estate in the

amount of $106,791.29 (Pltfs' Ex. J). Their claim was rejected (Pltfs' Exs. J and N), and they then filed suit against Vuka Radovich Stepovich, Mike Stepovich's widow and the executrix of his estate alleging in their complaint, *inter alia,* that they had left a large amount of rich unsluiced gravel dumped by the sluice boxes, and that there was $20,000 in gold in the dump and in the sluice boxes (R. 6).

SPECIFICATION OF ERRORS.

1. The Trial Court erred in refusing to grant appellant's motion for a directed verdict on the ground that appellees failed to prove any loss of profits and failed to present sufficient evidence to entitle the case to go to the jury.

2. The Verdict and Judgment are unsupported by the evidence because the testimony and exhibits offered and admitted into evidence at the trial were insufficient to show that appellees sustained damages in any amount, and further that such testimony and exhibits were insufficient to show that appellees sustained damages in the amount awarded by the jury.

3. For the foregoing reasons the Trial Court erred in granting judgment in favor of appellees and in refusing to grant judgment in favor of appellant.

SUMMARY OF ARGUMENT.

I. Appellees did not introduce sufficient evidence to entitle them to a verdict or judgment.

A. Appellees failed to introduce independent evidence of either wrongful eviction or damages, as required by applicable statute of the Territory of Alaska.

1. Insufficiency of proof of discovery of pay streak.

2. Insufficiency of proof of Mike Stepovich's knowledge of alleged pay streak.

3. Insufficiency of proof of spurious nature of suit filed by Mike Stepovich.

4. Insufficiency of proof that Mike Stepovich converted the gold in the sluice boxes and gravel dump.

5. Insufficiency of proof of the value of the gold allegedly converted by Mike Stepovich.

B. Appellees' testimony relating to damages is inherently improbable and contrary to the physical facts of record.

C. Appellees' proof relating to damages is insufficient to support an award of substantial damages for loss of profits under the rules of law applicable to damages for wrongful eviction from mining leases.

II. The size of the jury's verdict evidences a disregard of the instructions given by the trial court, and is not supported by the evidence.

III. The verdict of the jury was not entitled to any greater weight than that accorded the verdict of an advisory jury in an equity case.

ARGUMENT.

I

APPELLEES DID NOT INTRODUCE SUFFICIENT EVIDENCE TO ENTITLE THEM TO A VERDICT OR JUDGMENT.

A. Appellees failed to introduce independent evidence of either wrongful eviction or damages, as required by applicable statute of the Territory of Alaska.

Section 61-13-4 of Alaska Compiled Laws Annotated (1949) which governs the allowance and rejection of claims against decedents' estates, provides pertinently:

> "When the claim is presented to the executor or administrator, . . . if he shall be satisfied that the claim thus presented is just, he shall indorse upon it the words 'Examined and approved,' with the date thereof, and sign the same officially, and shall pay such claim in due course of administration; but if he shall not be so satisfied he shall indorse thereon the words 'Examined and rejected,' with the date thereof, and sign the same officially. . . . If any executor or administrator shall refuse to allow any claim or demand against the deceased after the same may have been exhibited to him in accordance with the provisions of this act, the claimant may present his claim to the commissioner having jurisdiction or to the district court or the judge thereof for allowance, giving the executor or administrator thirty days' notice of such application to the court. The district court or the judge thereof shall have power to hear and determine in a summary manner all demands against any estate agreeably to the provisions of this chapter, and which have been so rejected by the executor or administrator, and shall cause a concise entry of the order of allowance or rejection to be made on the record, which order shall have the force and effect of a judgment from which an appeal may be taken as in

ordinary cases: Provided *No claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, judge, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant. . . .*" (Italics added.)

The foregoing statutory language has been a part of the law of the Territory of Alaska at all times pertinent to the present litigation.

See also Section 4417, Comp. Laws Alaska (1933).

This provision was based on a similar provision contained in the Code of Civil Procedure of the State of Oregon (the pertinent portion of which is now found in Section 116.555, Oregon Revised Statutes), which was originally made applicable to the Territory of Alaska by Section 7 of the Act of May 17, 1884 (23 Stat. 25), and this Court has in the past looked to decisions of the Oregon Supreme Court as a guide in construing the Alaskan statute.

Esterly v. Rua, 122 Fed. 609, 612-13 (9th Cir. 1903).

The Oregon Supreme Court has in a long series of decisions applied this statutory provision rigorously to prevent the assertion of claims against decedents' estates unless clearly supported by evidence other than that supplied by the interested claimants.

In the early case of *Harding v. Grim,* 25 Or. 506, 508, 26 Pac. 634 (1894) that court laid down the applicable rule as follows:

". . . The effect of this statute is that, while the claimant is a competent witness in an action against an executor or administrator upon a claim or demand

against the estate of the deceased, he cannot prevail in the action unless he proves his case by some competent or satisfactory evidence other than the testimony of himself. His testimony may be used, perhaps, to corroborate other evidence in the case, but it is not sufficient, in itself, to establish his claim. There must be evidence tending to support the action, independent of his testimony, sufficient to go to the jury, and upon which the jury, or other trier of fact, would be authorized to find in his favor. As a consequence, it was incumbent on the plaintiff in this case to furnish some competent evidence tending to support his claim, other than his own testimony, and unless he did so the nonsuit was properly granted. . . ."

The rule adopted in the *Harding* case has since been consistently followed by the Oregon Supreme Court.

See:

In re Banzer's Estate, 106 Or. 654, 213 Pac. 406 (1923);

Uhler v. Harbaugh, 110 Or. 609, 224 Pac. 89 (1924);

Field v. Rodgers, 128 Or. 661, 275 Pac. 598 (1929);

Seaton v. Security Savings & Trust Co., 131 Or. 261, 282 Pac. 556 (1929);

In re Berger's Estate, 144 Or. 631, 25 P. 2d 138 (1933);

In re Millon's Estate, 154 Or. 615, 61 P. 2d 1030 (1936).

The philosophy to be adopted by the courts in administering this statutory provision was clearly stated in *Uhler v. Harbaugh, supra,* as follows (110 Or. at 617, 224 Pac. at 91):

> ". . . It should be remembered that at common law, and in many of the states by statute, a claimant against the estate of a deceased person is not permitted to testify. In view of the fact that the lips of an alleged promisor are sealed by death, and of the frequent attempts of unscrupulous persons to palm off fictitious claims under such circumstances, lawmakers have been, and courts should be, zealous to protect estates from the consequences of such attempts, and hence the rule adopted by our statute as construed in our opinions above cited."

Consequently, a claimant against an estate is required under the statute to present a complete prima facie case *independent of his own testimony.* As concisely stated in *Seaton v. Security Savings & Trust Co., supra* (131 Or. at 271, 282 Pac. at 559) the statute:

> ". . . exacts of a claimant proof of the material features of her demand independent of her personal testimony. This nonpersonal proof need not be of such cogency that alone it can overcome any proof which the defendant might assemble, but alone it must establish a prima facie case in behalf of the plaintiff. The plaintiff's personal testimony may reinforce and corroborate this independent testimony, but the latter must be so complete, as to the material items of the claim, that it does not need any piecing out by the personal testimony of the claimant. . . ."

It is abundantly clear from an examination of the record in the instant case that appellees have utterly failed to satisfy the statutory requirement that their claim be supported by competent or satisfactory evidence other than their own testimony.

The gist of appellees' complaint in this case is that Mike Stepovich, knowing that appellees had discovered a rich pay streak, caused them to be evicted from the leased premises in order to secure the profits therefrom for himself by filing a suit based on certain spurious claims, and by attaching their possessions and the contents of their gravel dump and the sluice boxes, and that he thereafter dismissed his spurious suit after he had succeeded in converting to his own use the gold contained in the sluice boxes and the gravel dump. The essential elements which it was necessary for appellees to prove in order to recover for a *wrongful* eviction were therefore: (1) the discovery by appellees of a rich pay streak, (2) Mike Stepovich's knowledge that appellees had discovered such a pay streak, (3) the spurious nature of the suit filed by him, (4) the conversion by Stepovich of the gold contained in the sluice boxes and gravel dump, and (5) the value of the gold converted by Stepovich, and remaining in the mine i.e., appellees' lost profits. As the following analysis demonstrates, appellees did not introduce evidence independent and apart from their own testimony to make out a prima facie case on any one of these elements.

(1) *Insufficiency of proof of discovery of pay streak.*

The only evidence that appellees had in fact discovered a pay streak came from their own lips. They did make some effort to show there *might* have been gold on the leased premises by three methods independent of their own testimony: (1) attempted proof of drill holes on a map of the leased premises, (2) attempted proof that another miner had found gold elsewhere on the leased prem-

ises, approximately seven years previously, and (3) proof of the release of the premises to another mining company after the eviction of appellees. (Appellees also attempted to prove that the lease between Mike Stepovich and lessees called for a higher royalty than that normally found in the Fairbanks area, but they attempted to prove this only by their own testimony.) Even if such evidence had all been admissible, it would not have made out a prima facie case, as required by Section 61-13-4, that *appellees* had *in fact* found a rich pay streak. In any event, the first two such attempted offers were correctly rejected by the trial court, and the proof of release of the premises was shown by cross-examination to be no evidence of value.

The attempted proof of drill holes—which were made by two different companies—was rejected because appellees produced no one competent to testify as to the preparation of the map and information thereon concerning drill holes (R. 105-109) and hence any attempt to have some person unconnected with such preparation read them into evidence would have constituted the rankest sort of hearsay.

See:

III Wigmore on Evidence (3d ed.) Secs. 790, 793.

Appellees' counsel made no attempt properly to qualify the map and the drill hole information thereon for admission under any recognized exception to the hearsay rule.

See:

United States v. Grayson, 166 F.2d 863, 869 (2d Cir. 1948);

Standard Oil Company v. Moore, 251 F.2d 188, 214 (9th Cir. 1957).

In any event, such information would not have constituted evidence that *appellees* made a valuable find.

The attempted proof that another miner had found some gold on the premises seven years earlier was rejected because there was no evidence to show that he had been working anywhere near where appellees had worked on the lease (the lease covering an area of 40 acres, according to the description contained in the lease—R. 9). Expert testimony established that placer deposits are extremely irregular, and that there is no certainty that a deposit will extend for more than a few feet unless intensive drilling operations are conducted to prove the extent of the deposit (R. 264, 266, 268-72, 313-16, 326-7). Consequently the proffered evidence was correctly rejected by the trial court as being of remote probative value.

See:

I *Wigmore on Evidence* (3d ed.) Section 28.

The decision of the trial court should not be disturbed in the absence of an obvious abuse of discretion.

See:

United States v. Uarte, 175 F. 2d 110, 112 (9th Cir. 1949);

Metropolitan Life Ins. Co. v. Armstrong, 85 F. 2d 187, 193 (8th Cir. 1936);

Walker v. Warehouse Transportation Co., 235 F. 2d 125, 129 (1st Cir. 1956);

Hawkins v. Missouri Pac. R. Co., 188 F. 2d 348, 351-2 (8th Cir. 1951).

The fact that Stepovich re-leased the premises did not constitute independent proof that appellees had discov-

ered a rich pay streak. Indeed, cross-examination disclosed that the new lessee had never attempted to mine the premises and that they were at the time of trial in 1957 in the same condition as when the appellees left the premises in 1942 (R. 110). Even the fact that a parcel of land is patented as a placer claim under the mining laws of the United States, which by statute provides for patenting only of the lands containing "valuable mineral deposits" (30 USC Section 22) is not evidence from which a jury is entitled to infer in fixing damages in condemnation proceedings that the land *in fact* contains *profitable* deposits, as it might not then contain gold in sufficient quantity for profitable working.

See:

Twin Lakes Hydraulic Gold Mining Syndicate, Ltd. v. Colorado M. Ry. Co., 16 Colo. 1, 27 Pac. 258 (1891).

The fact that a lease which has never been operated under has been made of certain premises should be entitled to no higher standing. Furthermore, it may be assumed that the releasing occurred in connection with Stepovich's settlement of his affairs incident to his permanent departure from Alaska, and not as an attempt to cash in on appellees' allegedly rich find. Otherwise why execute a 50-year lease to someone else?

In addition, it should be noted that appellees' attempted proof that the lease in question called for a higher royalty than that normally paid in the area was properly rejected as merely indicative of the fact that Mike Stepovich was a hard bargainer, and was not sufficiently probative of value to warrant its admission in evidence. In-

deed, the fact that appellees by their own admission conducted exploratory operations for 3½ months without notable success (R. 168) would appear to cast serious doubts on the supposed richness of the leased premises. In any event, the question, involving as it did, the exclusion of evidence of remote probative value, was properly within the sound discretion of the trial court to determine.

See:

United States v. Uarte, supra;
Metropolitan Life Ins. Co. v. Armstrong, supra;
Walker v. Warehouse Transportation Co., supra;
Hawkins v. Missouri Pac. R. Co., supra;

and the fact that proof was offered through appellees' own testimony renders it unavailable in testing the sufficiency of appellees' showing under Section 61-13-4.

It is therefore clear that appellees did not introduce enough evidence, aside from their own testimony, to warrant a finding that they had in fact discovered a pay streak.

(2) *Insufficiency of proof of Mike Stepovich's knowledge of alleged pay streak.*

Appellees' counsel attempted to portray Mike Stepovich as a greedy and grasping individual who constantly hovered over appellees and, as soon as he learned of their rich discovery took action to evict them from the leased premises. Appellant does not deny that Mike Stepovich may have observed appellees' operations and taken panning samples himself from the mine. This was his right under the terms of the lease (Pltfs' Ex. A, par. 9, R. 12),

and appellees were also obligated to supply him with the results of their panning (Pltfs' Ex. A, par. 7, R. 11). But there is not one shred of independent evidence that Mike Stepovich knew that appellees had discovered any rich pay streak—except to the extent that it may be implied from appellees' own testimony. Perhaps it could also be implied from the fact that Stepovich filed suit against appellees—except that, as indicated below, the record discloses no unequivocal evidence aside from appellees' own testimony that the suit was filed in a bad faith effort by Stepovich to seize appellees' alleged bonanza. Furthermore, the suit was not filed until three weeks to a month after appellees by their own testimony allegedly hit their pay streak (Pltfs' Ex. T, R. 79-80, 178-9).

(3) *Insufficiency of proof of spurious nature of suit filed by Mike Stepovich.*

Once again, the only unequivocal evidence that Stepovich's suit againt appellees was without foundation comes from appellees' own lips, yet appellees themselves admitted that four of the five claims sued on by Stepovich were owed by them to local merchants and assigned to Stepovich (R. 120-2, 184-5). There was testimony *(again only from appellees)* suggesting that one of these claims may subsequently have been reassigned by Stepovich (R. 122-3) but not even this testimony warranted the inference that the claim had not been bona fide assigned in the first instance and Nick Kupoff in fact admitted that the assignment had been made (R. 122). Appellees did dispute their liability on the largest claim—for the use of a large RD-7 caterpillar tractor. But here again we are left to

rely only on appellees' own testimony, and it is in connection with this claim that we can see clearly that appellees were less than candid in their testimony. Nick Kupoff flatly stated that the appellees never used this tractor and never had any dealing with it (R. 119). On the other hand, James Zukoev did admit that appellees in fact used the tractor pursuant to an agreement with Stepovich that they would clean the road out, including the road to Stepovich's house (R. 161). He admitted that they only cleaned the road out to the mine, and neglected until later to clean out the road to Stepovich's house (R. 161-2). How much later we do not know. Nor do we know whether Stepovich considered this a breach of his agreement with them and hence billed them accordingly for the reasonable value of the use of the tractor. His widow (the present appellant) did not move out from Fairbanks to join her husband at their house near the lease until July 1942, due to illness in the family and destruction of their home in a fire (R. 242-3). Accordingly, she was not on the premises at the time of this transaction involving the large tractor, and so had no knowledge of it, even if her testimony would have otherwise been admissible under Section 58-6-1 of Alaska Compiled Laws (1949). This illustrates the difficult problem of proof that is posed when dealing with claims against an estate, particularly when there is no independent evidence of the dealings between the parties. Whose burden is it to show the true nature of the transaction? Section 61-13-4 clearly places the burden on appellees. This is only just in a case such as this where appellees waited until after Mike Stepovich's death to file a claim. Claims filed under such cir-

cumstances should be carefully scrutinized (*In re Berger's Estate, supra,* 144 Or. at 653, 25 P. 2d at 146), and deserve to be regarded with suspicion.

It might be argued that two equivocal items of independent evidence, lend support to the claimed spurious nature of Mike Stepovich's suit: (1) the demand previously made by Mike Stepovich on August 8, 1942, for the payment of certain other items on account, and (2) the voluntary dismissal by Stepovich of his suit in November, 1942. However, neither item alone, nor both together, are sufficient proof by themselves of the spurious nature of Stepovich's suit *without recourse to appellees' own testimony to so depict them.* Furthermore, each incident is explained on grounds other than Mike Stepovich's desire to obtain appellees' supposed golden treasure trove. As pointed out in the statement of the case at pages 2 to 10 of this brief, the actual physical facts of record (as distinguished from appellees' own testimony) show rather clearly that appellees—far from having found a bonanza—were actually in failing financial circumstances during the first part of August. Stepovich accordingly demanded payment of accounts to date. Had he then demanded payment for rental of the RD-7 tractor he would have driven appellees out of business at that time, for their bank balance shows they would have been unable to pay such a demand (Pltfs' Ex. G). Subsequently, as Stepovich became convinced that appellees were improperly taking gold from the sluice boxes, he decided to assert the claim for the tractor, together with four other claims which appellees admit were in fact owed by them. The most that can be inferred from this action is that

Stepovich was willing to bring a suit, one claim of which was open to dispute, in order to put pressure on appellees to vacate the premises. It does not *by itself* show that Stepovich had no tenable basis for the suit and it in no way *by itself* shows that Stepovich brought the suit in bad faith as a means of obtaining appellees' supposed treasure trove. (The testimony of Stepovich's widow as to his concern about the withdrawal of gold from the sluice boxes was, of course, properly admissible, because, as pointed out by this Court in its previous opinion (184 F. 2d at 707, N. 2), Section 58-6-1 of Alaska Compiled Laws (1949), permits such statements of a decedent to be introduced in evidence in a civil action by or against an executor when a party to the action appears as a witness in his own behalf.)

The nonsuit in November, 1942, similarly is explained on a basis consistent with the fact that Stepovich was not attempting to seize appellees' treasure trove. By November, 1942, appellees had long since quit the premises, and never tried to resume mining operations on the leased premises (R. 185). They had not attempted to recover possession of the premises and had not even bothered to file a counterclaim in Stepovich's suit against them. Stepovich and his family had left Alaska to settle permanently in the Continental United States (R. 243, 245-6), and he had re-leased the premises. The trial court refused to grant a continuance of the suit. Under these circumstances, Stepovich, who was in ill health (R. 242) had insufficient interest in returning to Alaska in the middle of World War II, to testify at the trial, as he would have been

required to do. Consequently, he consented to a voluntary nonsuit.

Accordingly, it is clear that the only *independent* evidence concerning Mike Stepovich's conduct is not sufficient by itself to sustain a prima facie case that Stepovich acted in bad faith in bringing suit against appellees in order to convert their supposed treasure trove. There is no other independent evidence to give it the additional weight necessary to present a prima facie case. It takes on an invidious cast only in the light of appellees' own testimony as to the existence of their buried treasure. But Section 61-13-4 wisely precludes judging such ambiguous evidence in the light of appellees' interested testimony, and it must therefore be viewed as insufficient to support the jury's verdict.

(4) *Insufficiency of proof that Mike Stepovich converted the gold in the sluice boxes and gravel dump.*

The existence of any appreciable quantities of gold in the gravel dump and sluice boxes at the time of Stepovich's suit is proven only by appellees' own testimony which, as noted below, is itself open to serious contradictions. However, not even appellees attempted to testify that Stepovich processed the gold in the dump and removed the gold from the sluice boxes. James Zukoev testified that when he returned to the premises about a week after appellees had left, the dump was still there (R. 183), and Nick Kupoff admitted that so far as he knew, the dump could at the time of trial have been just as it was when appellees left the premises (R. 290-1). Therefore, there is no evidence—independent or interested—to show that Mike Stepovich converted any

gold left on the premises by appellees, and any verdict by the jury that he did so constitutes the sheerest speculation, which is an improper means of arriving at any finding of fact by either a court or jury.

See:

Moore v. Chesapeake & O. R. Co., 340 U.S. 573 (1951);

Controller of California v. Lockwood, 193 F. 2d 169 (9th Cir. 1951).

(5) *Insufficiency of proof of the value of the gold allegedly converted by Mike Stepovich.*

Even if all of the meager independent evidence introduced by appellees in this case be given a connotation unfavorable to appellant, we are still in the last analysis driven back to the fundamental question—did appellees in fact uncover a rich pay streak. Unless appellees can unequivocally answer this question in the affirmative by independent evidence, they have no claim against appellant, for they have not demonstrated by evidence deemed reliable by Section 61-13-4 that they were damaged. The question is not simply one of calculating *how much* appellees were damaged, but, more fundamentally, whether they were in fact damaged at all. If their supposedly rich pay streak is a figment of their own imagination, then they have no right to damages. Furthermore, even if they left some gold in the gravel dump and sluice boxes when they left the premises, they must show by independent evidence the amount and value of such abandoned treasure trove. To allow them to fix the fact and amount of damage by their own testimony and nothing more would completely eviscerate the protection

afforded by Section 61-13-4 to decedents' estates against the presentation of fictitious or vastly inflated claims.

Yet appellees have made no effort to verify by independent proof either the value of their alleged find, if any, or the amount of gold-bearing gravel removed by them from their alleged pay streak. The circumstances of this case demonstrate vividly why protection such as that provided by Section 61-13-4 is so necessary.

Appellees were by their own admission unskilled laborers with no prior experience at panning and evaluating gold in placer deposits (R. 125-7, 157-9). They apparently estimated the value of their findings merely by looking at the pans, without weighing the gold recovered, although the expert mining engineers called by appellant took pains to weigh their samples (R. 294, 318). Appellees sought no independent verification of their findings. In this connection, it should be noted that a number of errors can arise in sampling due to such factors as salted, or erroneous samples, an insufficient number of samples, improper location of samples, improper chemical analysis, and incorrect weighing of assays.

> Parks, *Examination and Valuation of Mineral Property* (1949), p. 42.

That appellees' claims may well have been exaggerated may be inferred from their own testimony regarding the amount of supposedly rich gravel removed by them from the alleged pay streak and dumped by the sluice boxes. James Zukoev testified that a block of gravel 62 feet by 6 feet by 12 feet was removed from the pay streak (R. 170-2, 180). This would have amounted to 4464 cubic feet, or 165⅓ cubic yards (Zukoev at one point also stated erro-

neously that a block 62 feet by 6 feet by 32 feet had been removed (R. 172), but he subsequently corrected this statement (R. 180)). Nick Kupoff's testimony as to the dimensions of the area mined in the pay streak tended to corroborate Zukoev's figures (R. 78-9, 115), and appellees' counsel indicated that he thought a block of gravel measuring 60 feet by 12 feet by 6 feet, or about 170 cubic yards, had been removed (R. 228, 383). In spite of Kupoff's and Zukoev's general agreement on the dimensions of the area mined in their alleged "pay streak", their estimates of yards of gravel removed and processed were at considerable variance with this testimony. Thus Kupoff testified that appellees removed somewhere around "four, five hundred" (unit of measurement unspecified) from their alleged "pay streak" (R. 80). On cross-examination, he indicated that appellees left either 200-300 yards, or 300-400 yards of gravel dumped by the sluice boxes when they left the premises (R. 138), and that this dump was from the "pay streak" (R. 138-9). Presumably, the balance, if any, had been run through the sluice boxes. James Zukoev testified that appellees had *sluiced* around 500 yards or more of the dirt from their alleged "pay streak", and yet when they left the premises, a large amount of gravel from the pay streak remained to be sluiced (R. 181-2). Appellees' testimony as to the amount of gravel removed from their alleged pay streak is therefore clearly at variance with their own testimony as to the dimensions of the area mined, and exaggerates the amount of gravel removed by more than three-fold!

Might not appellees have been guilty of similar exaggeration in estimating the value of the gold panned by them? Who could have contradicted them if they had

estimated their panning to average $100 a pan instead of 50¢ to $1? Even at 50¢ a pan, their estimate would have meant the discovery of a deposit (albeit of uncertain quantity) richer than anything known in the Fairbanks area at the time of trial. Here then is the strongest kind of case calling for a rigorous application of Section 61-13-4. In a case of this sort, where the lips of the one person who might be able to refute appellees' claim have been sealed by death, a court should require more proof than the interested testimony of appellees who were unskilled at gold evaluation in any case—before sustaining a substantial claim against an estate. Section 61-13-4 requires that claimants obtain more reliable proof by providing that no claim shall be allowed by "*any court, judge,* referee, *or jury,* except upon some competent or satisfactory evidence other than the testimony of the claimant." Appellees have utterly failed to produce such evidence to substantiate their claim of discovery of a valuable pay streak, and, accordingly, the jury should not have been allowed to return a verdict for them.

B. Appellees' testimony relating to damages is inherently improbable and contrary to the physical facts of record.

Even if Section 61-13-4 had not been a part of the Alaskan statutory law, the verdict and judgment in this case would still be subject to attack on another and wholly independent ground—namely, that appellees' testimony relating to their discovery and removal of a rich pay streak is inherently improbable and contrary to the physical facts of record. Where oral testimony is positively contradicted by the physical facts, neither the court nor jury can be permitted to give it credence.

See:

Deadrich v. United States, 74 F. 2d 619, 622 (9th Cir. 1935);

Galloway v. United States, 130 F. 2d 467, 471 (9th Cir. 1942), aff'd., 319 U. S. 372 (1943);

Lovas v. General Motors Corp., 212 F. 2d 805, 808 (6th Cir. 1954);

Atchison, Topeka & Santa Fe Ry. Co. v. Hamilton Bros., 192 F. 2d 817, 822 (8th Cir. 1951);

American Car & Foundry Co. v. Kindermann, 216 Fed. 499, 502 (8th Cir. 1914);

F. W. Woolworth Co. v. Davis, 41 F. 2d 342, 347 (10th Cir. 1930); cert. den., 282 U.S. 859 (1930);

Larabee Flour Mills Co. v. Carignano, 49 F. 2d 151, 153 (10th Cir. 1931).

Courts are not required to give credit to inherently improbable testimony even though it is not contradicted.

See:

Geigy Chemical Corp. v. Allen, 224 F. 2d 110, 114 (5th Cir. 1955);

20 Am. Jur., *Evidence,* Section 1183;

In re Leslie, 119 Fed. 406, 411 (D.C. N.D. N.Y. 1903);

Wong Ken Foon v. Brownell, 218 F. 2d 444, 446 (9th Cir. 1955).

In *Willett v. Fister,* 18 Wall. (U.S.) 91 (1873), the United States Supreme Court reversed a judgment entered against an estate after looking at the probabilities of the case as deduced from the evidence (including the improbable nature of the plaintiff's testimony), the long

delay of the complainant to assert any claim, and the fact that the person against whose estate the claim was made had died before any suit had been filed.

Even if appellees could show that they were wrongfully evicted from the premises, their right to recover damages still rests on their assertion of discovery of a rich pay streak. The only evidence in the record in support of such a discovery is their own testimony, which taken at their most conservative estimate, would have indicated a deposit richer than anything known in the Fairbanks area at the time of trial (R. 283-4). Their testimony also disclosed that they removed a large quantity of gravel from this supposedly rich pay streak, and left a sizeable amount of this gravel dumped by the sluice boxes at the time they left the premises (R. 137-9, 182).

Contrasted with appellees' tale of a supposed bonanza, we have the following undisputed physical facts of record:

(1) Paul Drazenovich, one of the original partners, quit the venture on August 6, 1942, *after* the discovery of the supposed bonanza (Pltfs' Ex. I). (Zukoev, after having his memory refreshed during a recess, testified that the discovery was made about July 20, 1942; Kupoff testified that it was made during the latter part of July or first part of August (R. 173-4, 178-9, 79-80); neither of them attempted to suggest that Drazenovich left before the pay streak was discovered). He transferred his interest in consideration of the remaining partners' agreement to assume his share of the partnership liabilities (Pltfs' Exs. I & M).

(2) Appellees were in straitened financial circumstances—their bank balance (as disclosed by their own

checkbook stubs—Pltfs' Ex. G)—dropped to $29.12 on August 10, 1942, and continued in that status until after they left the premises. Their counsel admitted they were required to conduct sluicing and clean-up operations in order to obtain money to pay their men (R. 356, 363), and that they wanted to get as much money out of the mine as early as they possibly could (R. 399-400). They owed Stepovich for back royalty payments and for other bills, at least one of which Stepovich paid to a merchant on their behalf (Pltfs' Ex. H). Yet they never conducted another *official* clean-up following the August 2nd clean-up, although they supposedly were hauling gold-rich gravel from their pay streak, and, according to Zukoev, had sluiced over 500 yards of it (R. 181-2).

(3) The dump by the sluice boxes on which appellees had, by their own testimony, left a large amount of gold-rich gravel from the pay streak when they left the premises was in fact almost devoid of gold content. This was established by careful testing by two expert mining engineers retained by appellant to make independent tests of the premises (R. 293, 300-301, 317-18, 319-20). The testimony of these two experts was allowed in evidence without objection by appellees' counsel, although he subsequently successfully objected to the introduction of vials containing bits of gold—the result of their testing. However, the trial judge treated their oral testimony as having already been admitted into evidence and no instruction was given to the jury to disregard it (R. 332-4).

Some question might be raised with respect to the reliability of this evidence due to the span of time between the date appellees left the premises in August, 1942, and

the date the testing was done, in the fall of 1957. This lapse of time reduces the probative force of the results of testing only if the dump by its nature might have been affected by the lapse of time, or if extrinsic circumstances might have caused some change.

See:

II *Wigmore on Evidence* (3d ed.) Sec. 437.

Undisputed testimony by the two mining engineers established that the amount of gold in the dump and its position in the dump would not be affected by the passage of time or by weather conditions (R. 306-7, 323). In addition, the undisputed testimony of an officer of the mining company that took possession of the premises as lessee shortly after appellees' departure established that no mining operations had ever been conducted by them on the premises, and that the premises were at the date of trial in the same condition as when originally leased to them in 1942 (R. 110). One of the two mining engineers who did the testing for appellant did testify that he encountered two levels of deposits in the dump, which had been deposited not more than a year apart, and probably less (R. 322-3). This result could have been produced by appellees' own sluicing operations in 1942. Appellees' counsel took the position at one point in his argument that some of the dump had been created in 1941, prior to the time of appellees' operations (R. 399, 405), and that this explained the source of two layers in the dump. Even if this were the correct explanation, the testing of the upper portions of the dump (the results of appellees' operations) yielded only $1.80 to $2.04 per cubic yard

in gold values (R. 301, 320), which was, of course, far under appellees' claim of $94.50 to $189 per cubic yard.

(4) The fact that no mining operations have been conducted on the premises since appellees' departure (in spite of the supposedly rich nature of their find) is further proof that the physical facts of record are at variance with appellees' claim of having found a bonanza.

Appellees' counsel recognized these glaring discrepancies between his clients' testimony and the undisputed physical facts of record, and, accordingly, in his closing argument to the jury he sought to avoid these contradictions by restating the evidence in a manner inconsistent with the record facts and volunteering "facts" not in the record. Appellees' counsel stated, contrary to the record facts, that the pay streak was not discovered until a short time after August 8, 1942, after Paul Drazenovich had quit the venture (R. 402-3, 405). (Zukoev had testified, *after having his recollection refreshed during a recess,* that the discovery was made about July 20th (R. 178-9).) Appellees' counsel volunteered that if Drazenovich had been at the trial "he might tell you another story. He might tell you a story of threats and a gun and things that way." (R. 403). Appellees' counsel sought to avoid the findings of appellants' two mining engineers by stating, again contrary to the record facts, that appelleees had sluiced practically all of the rich pay dirt dumped by them by the sluice boxes, and left very little, if any of the rich dirt there, so that the dump actually consisted of the results of appellees' earlier exploratory work, and/or an old dump from 1941 or before (R. 399-400, 404-5). (Not only had appellees testified that they

sluiced the results of their exploratory work to produce the amount of their three clean-ups, but they also testified that they left a large quantity of rich pay dirt on the dump when they left (R. 137-40, 181-2).) As if to tack down his points by recourse to passion (should the jury have remembered the facts of record), he appealed to the fact that Mrs. Stepovich was "down to her last yacht, her last Cadillac." (R. 400.)

Suggestions of counsel cannot, of course, take the place of evidence.

> *United States v. Coal Cargo,* 11 F. 2d 805, 808 (D.C. E.D. Pa. 1924); affirmed, 11 F. 2d 809 (3d Cir. 1926); cert. den., 273 U.S. 696 (1926).

Certainly they cannot be substituted for record evidence which is embarrassing to appellees. Appellees had full opportunity to explain the circumstances of Paul Drazenovich's departure, and they failed to do so. Their failure to produce available evidence gives rise to the presumption that, if produced, the evidence would have been unfavorable to them.

See:

> *Hann v. Venetian Blind Corp.,* 111 F. 2d 455, 459 (9th Cir. 1940);
>
> *Brown v. Maryland Casualty Co.,* 55 F. 2d 159, 161 (8th Cir. 1932).

It is therefore clear from the undisputed physical evidence of record that appellees found no treasure trove, and that their testimony that they did was inherently improbable and should not have been credited. Not having found a rich pay streak, they suffered no damages even

if it could be said that they had been wrongfully evicted. In addition the foregoing evidence further demonstrates that appellees' claim was not proved—but was in fact disproved—by the evidence other than the testimony of the claimants. Consequently, appellant was entitled to have a verdict directed in her favor.

C. Appellees' proof relating to damages is insufficient to support an award of substantial damages for loss of profits under the rules of law applicable to damages for wrongful eviction from mining leases.

In *Anvil Mining Company v. Humble,* 153 U. S. 540, 549 (1894), the United States Supreme Court laid down the rule that in fixing damages for loss of profits where plaintiffs were prevented from completing a contract to mine iron ore, profits which are a mere matter of speculation cannot be made the basis of recovery, while profits which are reasonably certain may be allowed. The court upheld an award of damages for lost profits on the ground that there was testimony in the record to show the cost of mining each ton of ore, and also the amount of ore remaining in the mine. The amount per ton that plaintiffs were to receive from defendant for the ore removed was fixed by contract.

This result is in accordance with the general rule requiring a reasonable degree of certainty in fixing damages.

See:

15 Am. Jur., *Damages,* Secs. 20, 21.

In determining lost profits as a measure of damages, this Court has been particularly emphatic in requiring that

damages due to loss of profits be based on reliable evidence and not on speculation.

Flintkote Company v. Lysfjord, 246 F. 2d 368, 393-4 (9th Cir. 1957), cert. den. 355 U.S. 835 (1957);

Wolfe v. National Lead Company, 225 F. 2d 427, 433-4 (9th Cir. 1955), cert. den., 350 U.S. 915 (1955);

Putnam v. Lower, 236 F. 2d 561, 571-2 (9th Cir. 1956).

Where a lessee under a mining lease produces no reliable or reasonably certain evidence as to the quantity or value of the ores remaining in the mine, or that there would have been any profits, a judgment for substantial damages will be set aside as based wholly on speculation.

See:

Smuggler-Union Mining Co. v. Kent, 47 Colo. 320, 112 Pac. 223 (1910);

Hoosac Mining & Milling Co. v. Donat, 10 Colo. 529, 16 Pac. 157 (1887).

As the Colorado Supreme Court stated in *Smuggler-Union Mining Co. v. Kent, supra* (47 Colo. at 334, 112 Pac. at 228):

> ". . . it is not surprising that plaintiffs in their testimony say they could have taken out ores of the value of at least $900,000, and would have surely made $200,000 profit during the remaining 18 months of their term, had not their possession been interfered with, notwithstanding they swear that during their six months' occupancy they removed and milled ores extracted by stopping on the vein, which, so far as it

had been exposed at all, was the result of the work of others, of the gross value of only $5,000, and at a profit of $3,500 to $3,800. The jury returned a verdict for $5,000 in favor of plaintiffs. It might just as well have been for $250,000. There is no evidence at all upon which the verdict can rest. It is purely speculative. The estimate of plaintiffs' witnesses as to quantity and value, as well as the verdict of the jury, is conjectural—the result of guesswork. A judgment based on such a foundation cannot stand."

To be substantial enough to sustain a jury verdict, evidence must not be vague, uncertain, incompetent or irrelevant and must carry the quality of proof and have the fitness to produce conviction.

See:

United States v. Kerr, 61 F. 2d 800, 803 (9th Cir. 1932);

Pennsylvania Pulverizing Co. v. Butler, 61 F. 2d 311, 314 (3d Cir. 1932).

Where lessees are operating a mine at a loss, only nominal damages may be recovered for a wrongful eviction.

See:

Phenix Jellico Coal Co. v. Grant, 136 Ky. 751, 125 S.W. 165 (1910);

58 C.J.S. *Mines and Minerals,* Sec. 174, p. 373.

In determining whether a mine has been operated at a profit, or whether it is a losing venture, the operating expenses must first be subtracted from revenues.

See:

Butterfield v. Snively, 60 Ohio App. 14, 19 N.E. 2d 284 (1937).

Applying these rules to the present case, it is clear that appellees failed to furnish any reliable basis for calculating lost profits.

In their complaint appellees alleged that they had left gold in the dump and sluice boxes valued at $20,000, and, in addition, sought recovery of operating expenses in the amount of $6791.29, and the balance as lost profits if they had been permitted to continue mining (R. 6-8).

It was clearly established from the record that placer deposits are extremely irregular, and that there is no certainty that a deposit will extend for more than a few feet unless intensive drilling operations are conducted to prove the extent of the deposit (R. 264, 266, 268-72, 313-16, 326-7). As there was no admissible evidence that any such tests had been made which shed light on the value, if any, of appellees' "pay streak," the claim for lost profits for future operations must be immediately rejected at the outset, and we are then left to determine what profit, if any, appellees lost by not being able to process the dump and clean-up the sluice boxes. Appellees are not in any event entitled to more than this as they did not show by competent evidence that their "pay streak" extended beyond the area being mined at the time of their departure from the premises. Any award based on the theory that the deposit extended for any distance would have to be based on the sheerest speculation.

Turning then to the value of the gold, if any, left, in the dump and sluice boxes, we are faced with a hopeless jumble of vague, conflicting estimates. Even if we assume that appellees' unverified estimates of the richness

of their deposit are accurate (a dubious assumption at best, considering their lack of qualifications to evaluate and their obvious interest in the outcome), we are still at sea as to exactly how rich the deposit was and how much was removed. Appellees' estimates as to value were extremely vague. Nick Kupoff estimated that values averaged 50 cents to $1 a pan (R. 78-9). James Zukoev estimated the results as sometimes $1 a pan, sometimes less, and sometimes more, and at one point he guessed that it "maybe" even averaged $1.60 or $1.80 a pan (R. 169-70, 173), but even appellees' own counsel did not give credence to this latter guess (R. 226, 274, 324, 382). Estimates as to the amount of gravel removed were even more unsatisfactory. Kupoff and Zukoev agreed generally that the dimensions of the area mined by them in the supposed pay streak was 60 or 62 feet by 12 feet by 6 feet (R. 78-9, 115, 170-2, 180) (Zukoev at one point gave the dimensions as 62 feet by 6 feet by 32 feet, but he later corrected this statement (R. 172, 180)). This would have amounted to 4464 cubic feet, or 165⅓ cubic yards. However, Kupoff testified that appellees removed somewhere around "four, five hundred" (unit of measurement unspecified) from the alleged pay streak (R. 80), and on cross-examination indicated that they had left either 200-300 yards or 300-400 yards of gravel from the pay streak dumped by the sluice boxes (R. 138-9). Zukoev testified that appellees had *sluiced* around 500 yards or more of the dirt from the pay streak, and yet when they left the premises, a large amount of gravel from the pay streak remained to be sluiced (R. 181-2). Faced with this vague and conflicting testimony, any decision by the jury as to the value of the

gold removed by appellees from their pay streak and left in the dump and sluice boxes was bound to be based on speculation and guess. Furthermore, we have no evidence with respect to the cost of sluicing the gravel left in the dump and cleaning up the sluice boxes so as to determine the net cost of appellees' operations. To permit a jury (or a court) to arrive at a verdict or judgment under these circumstances is to permit resort to the sheerest speculation.

As was aptly stated by the Eighth Circuit Court of Appeals in *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, 102 (8th Cir. 1901):

> ". . . Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. . . ."

This is not merely a case of determining extent of damage by approximation after the relevant factors of value of ore, extent of area mineable, and cost of operations have been fairly well determined. The basic factors to be employed are themselves vague, conflicting and uncertain.

Under these circumstances, appellees were not entitled to a verdict for substantial damages in any event, even if there had been independent proof of wrongful eviction

and damages as required by Section 61-13-4, and even if the physical facts of record had supported appellees' claim.

II

THE SIZE OF THE JURY'S VERDICT EVIDENCES A DISREGARD OF THE INSTRUCTIONS GIVEN BY THE TRIAL COURT, AND IS NOT SUPPORTED BY THE EVIDENCE.

On October 26, 1957, following return of the jury's verdict, counsel for appellant made a motion for a directed verdict or for a new trial, which motion was denied by the District Court (see Appendix II to this brief).

Even if this court should conclude that there is independent evidence in the record sufficient to sustain a verdict for appellees without recourse to speculation, and that their testimony is not so inherently incredible and contrary to the physical facts of record as to have required the trial court to direct a verdict for appellant, the amount of the jury's verdict is still contrary to the instructions given, and is not supportable by the evidence.

As pointed out earlier in this brief (pages 6, 39), appellees failed to establish that the dimensions of their supposed pay streak extended beyond the area actually mined by them, and accordingly they would at most have been entitled to a verdict only for the gold content of the gravel which had been mined and removed to the dump and sluice boxes at the time appellees left the premises. In their complaint, appellees fixed the value of the gold left in the dump and sluice boxes at $20,000. In view of the jury's verdict ($26,802.12), and the amount of operat-

ing expenses claimed by appellees as damages in their complaint ($6791.29), it appears that the jury followed appellees' complaint and awarded approximately $20,000 for the gold in the dump and sluice boxes. This was patently in disregard of the court's instructions that in arriving at any award the jury must first deduct the amount of appellees' operating expenses and Mike Stepovich's 33⅓% royalty (Instructions R. 26-7). On doing so, it is clear that the jury could have awarded no more than $8892.71 (after subtracting Stepovich's royalty in the amount of $6667 and claimed operating expenses of $6791.29 and making allowance for appellees' portion of the three clean-ups already made, or $2350.67). The deduction of Stepovich's royalty was, of course, required by the terms of the lease, and the deduction of operating expenses was required by applicable judicial decisions.

See:

Butterfield v. Snively, supra;
Phenix Jellico Coal Co. v. Grant, supra;
Anvil Mining Company v. Humble, supra;
Smuggler-Union Mining Co. v. Kent, supra.

Nor is the amount of the jury's verdict supportable on any other theory. The highest valuation that the jury could conceivably have placed on the gold in the dump and sluice boxes was approximately $31,248 (computed on the basis of an average value of $1 per pan or $189 per cubic yard, and a block of gravel 62 feet by 6 feet by 12 feet, or approximately 165⅓ cubic yards). After deducting Mike Stepovich's 33⅓% royalty ($10,416) and appellees' alleged operating expenses ($6791.29) and making due allowance for appellees' portion of the three clean-ups

already made ($2350.67), the maximum verdict that the jury could have awarded in compliance with the court's instructions on *any* tenable theory was $16,391.38.

Where a jury returns a verdict in disregard of a court's instructions or which is otherwise manifestly excessive on the basis of the record evidence, an appellate court will set the verdict aside, and this court has itself done so in the past.

See:

Cobb v. Lepisto, 6 F. 2d 128 (9th Cir. 1925);

Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 408 (4th Cir. 1948);

Boyle v. Bond, 187 F.2d 362, 363 (C.A.D.C. 1951).

The necessity for the exercise of such power in the proper administration of courts of justice was cogently set forth by Judge Parker in *Virginian Ry. Co. v. Armentrout, supra* (166 F. 2d at 408), when he stated:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B.N.C. 109, 132 Eng.Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Pub. Co., supra, 178 Pa. 481, 36 A. 298, as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions.

It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny,* which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts* ought to exercise unflinchingly.' (Italics supplied.)

To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. 2d 350.

The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear.''

In view of the discussion below at pages 45-47 of this brief, there is even less reason than usual for giving sanctity to the jury's verdict in this case.

III

THE VERDICT OF THE JURY WAS NOT ENTITLED TO ANY GREATER WEIGHT THAN THAT ACCORDED THE VERDICT OF AN ADVISORY JURY IN AN EQUITY CASE.

The instant suit was brought under what is now Section 61-13-4 of Alaska Compiled Laws (1949) as a result

of the rejection by appellant of appellees' claim against Mike Stepovich's estate. Section 61-13-4, by its terms, contemplates a summary determination of rejected claims by a judge sitting without a jury. Although the section also contemplates by its terms that a jury may be called to determine the factual matters in dispute, the parties have no right to a trial by jury.

See:

Esterly v. Rua, 122 Fed. 609, 613 (9th Cir. 1903).

In the absence of an order for a jury trial entered by the court upon consent of both parties under Rule 39(c), any jury used in the action is advisory only.

Co-Efficient Foundation v. Woods, 171 F. 2d 691, 693-4 (5th Cir. 1948);

2 Barron & Holtzoff, *Federal Practice and Procedure,* Sec. 891, p. 596.

No such order was entered in this case (see Appendix III to this Brief), and the parties agreed, at most, to the use of a jury as an advisory jury. Therefore, on review before this court, the appeal is from the trial court's judgment as though no jury had been present.

See:

(American) Lumbermens Mut. Cas. Co. v. Timms & Howard, Inc., 108 F. 2d 497, 500 (2d Cir. 1939);

Major v. Phillips-Jones Corp., 192 F. 2d 186, 189 (2d Cir. 1951); cert. den. 343 U.S. 927 (1952);

5 *Moore's Federal Practice* (2d ed.), Par. 39.10[3], p. 725.

Consequently, this court may review the judgment in question here as if the trial court had found the facts, and

reject the judgment if it is concluded to be clearly erroneous.

Federal Rules of Civil Procedure, Rule 52(a).

It is clear from the foregoing discussion in this brief that the judgment entered was in fact clearly erroneous.

CONCLUSION.

This case illustrates in striking fashion why suits should not be allowed against decedents' estates based solely on the uncorroborated testimony of interested claimants. Under such circumstances, claimants may spin their tales of grievous damage without fear of contradiction, and the true story of what actually happened may never be told. In this case, even if we were to rely solely on appellees' story as it appears in the record, it is clear that the whole story as to what really transpired between the appellees and Mike Stepovich has not been accurately told. The transaction concerning the large tractor demonstrates that fact. Nick Kupoff flatly denied that appellees ever had any dealings with it, but James Zukoev admitted that they used it, and used it in a manner contrary to their agreement with Stepovich. The record even indicates at one point that appellees themselves filled the mine shaft full of water! (R. 185.) We do not pretend to know with certainty what in fact prompted Mike Stepovich to file a complaint against appellees, but it is only fair to assume from the record that he was acting to remove appellees from his premises because he felt they were surreptitiously cleaning up

the meager gold they had found in the sluice boxes, without accounting to him for his share. Perhaps he should have picked a different method of approach to the problem. But the fact that he did not does not justify an award of substantial damages to appellees for a golden bonanza that did not exist. Two wrongs do not make a right. Simple justice should prompt this court to reverse the judgment of the trial court and order the entry of a judgment dismissing appellees' complaint. The evidentiary requirements of Section 61-13-4 demand it.

Dated, San Francisco, California,
August 29, 1958.

Richard J. Archer,
Marshall L. Small,
Morrison, Foerster, Holloway,
Shuman & Clark,
Attorneys for Appellant.

(Appendices I, II and III Follow.)

Appendices.

Appendix I

INFORMATION WITH RESPECT TO EXHIBITS MADE A PART OF THE RECORD.

Identification No.	Exhibit No.	Description of Exhibit	Record Reference: Identification	Record Reference: Offered & Received
I Plaintiffs' Exhibits:				
1	A	Mining lease	41	42
2	B	Assignment of partnership interest to Kitoff	52	53-4
3	C	Assignment of partnership interest to Kobak	52	54
4	D	Time book	54	58
5-A	E-1	Time book	59	63
5-B	E-2	Time book	59	63
6	F	Envelope containing miscellaneous checks	68	71
7	G	Check book with stubs	71	72
8	H	Statement, dated August 8, 1942, presented by Stepovich to plaintiffs	73	73
9	I	Assignment of partnership interest by Drazenovich to Kupoff and Zukoev	75	75
10	J	Creditors' claim	75	77
11	K	Complaint filed and Summons obtained by Stepovich	81	82-3
12	L	Writ of attachment	83	83
13	M	Memorandum agreement by partners of North Star Mining Company promising Drazenovich to assume the debts of the partnership	83	84
14	N	Letter from Collins to Kupoff	84	84
15	O	Minute order in case No. 4950 providing for a nonsuit	85	85
17	P	Letter from Stepovich to U. S. Marshal dispensing with services of watchman	86	87
18	Q	Writ of attachment	87	87
21	R-1, 2, 3 & 4	Notices of attachment	97	98
22	S	Bank book and deposit slip	98	99
20	T	File in case No. 4950 (Stepovich's suit vs. Zukoev, et al.)	97	114
16	U	Marshal's docket sheet in case 4950	85	115
23	V	Map of claim	151	154
24	W	Map of claim	154	154-5
II Defendant's Exhibits:				
B	1	Photograph of camp	240	241
E	4	Pictures of dump	294	295

Appendix II

[Title of Court and Cause.]

MOTION FOR A DIRECTED VERDICT OR FOR A NEW TRIAL.

The defendant, having moved for a directed verdict at the close of all of the evidence, which motion was not granted, hereby moves for the entry of judgment in accordance with her motion for the reason that the evidence introduced by the plaintiffs is insufficient in law to form the basis of a verdict for the plaintiffs.

In the alternative, if the foregoing motion is not granted, the defendant moves for an order vacating and setting aside the verdict of the jury, and granting defendant a new trial, for each of the following reasons affecting materially the substantial rights of the defendant:

1. The court erred in rejecting relevant and competent evidence offered by the defendant which evidence consisted of testimony of plaintiffs in the prior trial.
2. The verdict is not sustained by sufficient evidence.
3. The verdict is contrary to the weight of the evidence.
4. There is no sufficient or substantial evidence to support the amount of the jury's verdict.
5. The amount of the verdict is against the weight of the evidence.
6. There is not sufficient evidence to justify an award of damages for loss of profits and the

court erred in instructing the jury that they could return a verdict based on loss of profits.

7. The amount of the verdict is excessive and appears to have been given under the influence of passion and prejudice.

8. The argument of counsel was improper in that it contrasted the financial condition of plaintiffs and defendant, introduced facts not in the record, and was an appeal to passion and prejudice.

[Title of Court and Cause.]

HEARING CONTINUED

Vernon D. Forbes, presiding.

Came the respective counsel as heretofore.

Mr. Cole presented rebuttal argument on the defendant's Motion for a New Trial.

The Court being fully advised in the matter, it was ORDERED that the Motion for a directed Verdict and for a New Trial be denied.

Feb. 27, 1958
Entered in Court Journal
No. 63, Page 191

Appendix III

THIS IS TO CERTIFY, That, at the time cause No. 5395, entitled Kupoff et al v. Stepovich, etc., was filed in the above-entitled Court, the Federal Rules of Civil Procedure did not apply to Alaska and, as a consequence, no demand for a jury trial was filed. This action was filed originally on October 15, 1945, and the Rules of Civil Procedure were applicable to Alaska July 18, 1949. Law cases were tried by Jury unless there was a Stipulation made orally or filed that a jury was waived.

As indicated by the attached copy of the minute order of the first day of trial herein, there was no opposition by either side to a jury trial.

WITNESS my hand and the seal of the above-entitled Court this 26th day of July, 1958.

John B. Hall
Clerk of Court

[Title of Court and Cause.]

TRIAL BY JURY

Plaintiff Nick Kupoff was present and represented by Warren A. Taylor; the defendant was represented by Mike Stepovich and Julien A. Hurley.

Respective counsels examined prospective Jurors as to their qualifications to set as trial Jurors in this cause and exercised their challenges for cause and their peremptory challenges.

At 12 N. the Court duly admonished the Jury and continued the trial of this cause until 2:00 p.m.

Dec. 28, 1948
Entered in Court Journal
No. 38, page 9

ORDER

In the Matter of Setting Civil Cases for Trial

With the consent of the respective counsels in the following listed causes, it was Ordered that the trial of each case listed be set on the date following its title, to wit:

5395 Kupoff et al vs
Stepovich, etc. 10:00 a.m., December 21, 1948

Nov. 5, 1948
Entered in Court Journal
No. 37, page 234